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May 24, 2006

Ms. Susan M. White
Mining Program Coordinator
Utah Division of Oil, Gas & Mining
1594 West North Temple, Suite 1210
P.O. Box 145801
Salt Lake City, Utah 84114-5801

Re: Response to Deficiency Notice, Peay's Dream Mine, S/049/054, Utah
County, Utah

Dear Ms. White:

I am writing on behalf of my client, Richard Davis, in response to the February 22, 2006 letter ("Letter") from your office (the "Division") wherein you assert that Mr. Davis' Notice of Intent to Commence Small Mining Operations ("NOI"), dated February 1, 2006, pertaining to Peay's Dream Mine ("Mine"), is incomplete. Your letter goes on to set out a series of alleged deficiencies that, in the Division's view, justify the Division's refusal to accept Mr. Davis' NOI as complete. However, for the reasons articulated below, these supposed deficiencies do not render the NOI incomplete. Moreover, the Division has entirely failed to identify any information required by the statute and regulations to be included in the NOI, that Mr. Davis has not already provided therein.

Before addressing the Division's additional information requirements, I would like to express my concern that the Division's Letter was not sent to me as Mr. Davis' counsel in the referenced matter. I first learned of the Letter on April 13, 2006 when it was presented by Provo City during oral argument on Provo City's motion for a preliminary injunction to prevent the commencement of mining activities at the Mine. I am frankly at a loss as to why a copy of this letter was not sent to me on February 22.

RECEIVED

MAY 25 2006

DIV. OF OIL, GAS & MINING

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cc: Susan
Lynn
Mary Ann

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My name and address is clearly listed in the NOI and I am designated to receive all notices required to be given by the Division to Mr. Davis. My concern is compounded by the fact that, as indicated on the Letter's cc list, the Letter was sent to Provo City's counsel, Camille Williams. The Division is well aware of ongoing litigation concerning the subject property between Mr. Davis and Provo City. Given this knowledge, copying the Letter to Provo City's counsel without sending a copy to Mr. Davis' counsel, at a minimum, demonstrates Division bias against Mr. Davis' project and, worse yet, gives the impression that the Division is colluding with Provo City to frustrate the project. My address and firm affiliation has changed since the submission of the NOI, but I continue to represent Mr. Davis in the referenced matter. Please ensure that any future communications between the Division and Mr. Davis pertaining to the Rock Canyon Mine are copied to me at my new office location set forth above.

I. Mr. Davis' Notice of Intent to Commence Small Mining Operations Does Not Require Division Approval.

As to the substantive issues raised by the Letter, it appears necessary to first discuss the limits of the Division's authority under the Utah Mined Land Reclamation Act of 1975 (the "Act"), Utah Code Ann. §§ 40-8-1 et seq., and its implementing regulations, UAC R647. The Act and the regulations make clear that Mr. Davis does not need an approval from the Division in order to commence the small mining operation contemplated by his NOI. "Except for the form and amount of surety, an approval of a notice of intention for small mining operations is not required."¹ The regulations expand upon this slightly:

A notice of intention to commence small mining operations will not require Division approval. However, all of the required information must be provided to the Division. Division approval is required for all variances from Rules R647-3-107 [pertaining to operation practices], 108 [pertaining to hole plugging requirements], and 109 [pertaining to reclamation practices], regardless of the number of surface acres of disturbance planned.

UAC § R647-3-101(4). The "required information" identified in the foregoing provision simply refers to the information required by the regulations to be included in a NOI for a small mining operation.² In other words, if the NOI contains all the information required by the regulations and addresses all of the operation, hole-plugging and reclamation practices itemized in the regulations, the NOI is complete. Per the foregoing requirements, Mr. Davis' NOI contained all of the information required by the Act and the regulations. The NOI contains all of the ownership

¹ Utah Code Ann. § 40-8-13(5).

² See UAC §§ R647-3-103.

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information required by R647-3-104, all of the location information and maps required by R647-3-105, and the operation plan required by R647-3-106. Additionally, the NOI addresses the various operation and reclamation practices and standards set forth in R647-3-107 and 109 (There are no drill holes associated with the project, so there are no hole-plugging requirements to be met per R647-3-108). Finally, as is made clear in the NOI, Mr. Davis does not need, and has not sought, any variances from the foregoing standards requiring application under R647-3-110.

As discussed in greater detail below, the alleged informational deficiencies identified in the Division's Letter do not correspond with any informational requirements contained in the Act or the relevant regulations. Furthermore, allowing the Division to "deem" Mr. Davis' NOI incomplete on the basis of alleged informational deficiencies not covered by the regulations, would essentially give the Division de facto discretionary authority to disapprove an NOI for a small mining operation. This type of de facto discretionary approval authority is contrary to the express provisions of the Act and to the Division's own regulations. The Division cannot acquire approval authority over Mr. Davis' NOI by arbitrarily requiring "additional information" that the statute and regulations do not require Mr. Davis to furnish.

II. A Cultural Resources Survey Is Not Required for Mr. Davis' NOI to be Considered Complete.

Turning now to the individual alleged deficiencies outlined in the Letter, the Division first claims that the State Historic Preservation Office ("SHPO") has found that there is a likelihood that "significant cultural resources" may exist within the Mine area. The Letter goes on to "request" that a cultural resource survey be conducted prior to any mining related disturbance and that if cultural resources are found, that Mr. Davis avoid or mitigate prior to proceeding. As an initial matter, the Letter does nothing to describe the location, nature or extent of the significant cultural resources that SHPO allegedly found are likely to exist within the Mine area; nor does it provide any detail, evidence, correspondence from SHPO or other documentation supporting SHPO's supposed claim. Mr. Davis is thus being asked to spend substantial sums of money on a survey to search for something that could constitute a significant cultural resource based on nothing more than the Division's bare allegation that SHPO thinks something of cultural significance might be there. Mr. Davis will not be obtaining the requested cultural resource survey and, more importantly, the Division does not have the authority to require him to do so.

Though the Letter does not cite any specific statutory provisions or caselaw to support its cultural resources survey request, the Division is presumably relying on

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Utah's historic preservation laws found at Utah Code Ann. §§ 9-8-102 et seq. (2005). Specifically, with respect to State agency historic preservation obligations, the statute states:

- (1) Before expending any state funds or approving any undertaking, each state agency shall:
 - (a) take into account the effect of the undertaking on any district, site, building, structure, or specimen that is included in or eligible for inclusion in the National Register of Historic Places, or the State Register; and
 - (b) . . . allow the state historic preservation officer a reasonable opportunity to comment with regard to the undertaking or expenditure.

Utah Code Ann. § 9-8-404.

There are two critical points that need to be made concerning the foregoing statute in particular and federal and State historic preservation laws in general. First, the Division would only be required to analyze the effect of the Mine on historical resources, and thereby require Mr. Davis to conduct the requested cultural resources survey, if it was "approving [the] undertaking" or "expending... state funds." Because there is no approval of the NOI to be given, the Division has no obligation to "take into account" the effect of Mr. Davis' Mine operation on cultural or historical resources. Similarly, there will be no expenditure of State funds with respect to the NOI. Moreover, as discussed at length above, because the Division does not have the statutory authority to approve Mr. Davis' NOI, the Division lacks the authority to impose the cultural resource survey requirement requested in the Letter.

Second, there are no federal or State statutory provisions that impose an independent obligation on private landowners to conduct a survey for cultural resources on private lands. Thus, there is no independent statutory basis for the Division's request that Mr. Davis conduct a cultural resource survey on his Mine property. Even if federal or State law imposed such an obligation on Mr. Davis, the Division could not require such a survey in this case because such a survey is not a requirement for a complete NOI.

The Division cannot claim that Mr. Davis' NOI is "incomplete" on the grounds that Mr. Davis has not conducted a cultural resources survey that the law does not mandate and the Division lacks the discretionary authority to require.

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III. Mr. Davis' Project Does Not Need Approved Permits from Provo City or Utah County in Place for the NOI to be Considered Complete.

The next alleged deficiency outlined in the letter is the fact that Mr. Davis has not yet obtained the necessary permits from Provo City and Utah County. The Letter then goes on to state that such permits will need to be obtained before the Division can accept Mr. Davis NOI. This is false. Mr. Davis does not need to have other relevant City, County or other government agency permits in place in order for his NOI to be considered complete. Local and other agency permits are not listed among the information required to be included within an NOI for a Small Mining Operation. In fact, the regulations only discuss local government permits and rules in only one provision:

(3) Operator Responsibilities, Compliance with other Local, State and Federal Laws:

The approval or acceptance of a complete notice of intention shall not relieve an operator from his responsibility to comply with the applicable statutes, rules, regulations, and ordinances of all local, state and federal agencies with jurisdiction over any aspect of the operator's mining operations, including, but not limited to: Utah State Division of Water Rights, the Utah Department of Business Regulation, the Utah State Industrial Commission, the Utah Department of Environmental Quality, the Utah Division of State History, the Division of Forestry, Fire and State Lands, The School and Institutional Trust Lands Administration, the Utah Division of Wildlife Resources, the U. S. Fish and Wildlife Service, the United States Bureau of Land Management, the United States Forest Service, the United States Environmental Protection Agency, and local county or municipal governments.

UAC § R647-1-102(3). The foregoing provision does not require the issuance of other relevant governmental permits as a condition for a complete NOI for a Small Mining Operation. In fact, it contemplates just the opposite. The above regulation clearly contemplates acceptance of an NOI as entirely separate from the question of whether or not other required governmental approvals have been obtained. The regulation does not require an operator to obtain all other governmental permits in order to have a complete NOI. Rather, the regulation simply states that the fact that an NOI has been accepted does not relieve an operator from the permitting requirements of other governmental agencies having jurisdiction over the mine in question. Thus, the drafters

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of the regulation in question anticipated that NOIs would be accepted without having relevant permits from other government agencies in place.

As indicated in the NOI, Mr. Davis has every intention of obtaining the necessary permits and approvals from Provo City (the municipality asserting land use jurisdiction over the Mine property, which Mr. Davis disputes) or Utah County. However, the fact that he has not yet acquired these other permits does not give the Division authority to deem the NOI in question incomplete. The Division cannot assume approval authority over a small mining operation NOI by "piggybacking" on the approval authority of other agencies such as Provo City.

IV. Mr. Davis has the Legal Right to Mine the Subject Property and Does Not Need to Resolve His Ownership Disputes with Red Slab, LLC and Provo City in Order to Have a Complete NOI or to Commence Mining.

The third deficiency alleged in the Letter deals with Mr. Davis' legal right to mine within the project area. In support of this allegation, the Division points to three separate issues: (1) the ongoing dispute between Mr. Davis and Red Slab, LLC ("Red Slab") concerning the mineral and surface ownership of the Mine, (2) the conservation easement covering the Mine property granted by Red Slab to Provo City, and (3) the current Fourth Judicial District Court order ("Order") allegedly prohibiting mining activity on the Mine property. In requiring resolution of these disputes prior to acceptance of the NOI, the Division has misconstrued the nature of these disputes and their impact on the NOI completion process. For the reasons set forth below, none of these issues has any effect on Mr. Davis' legal right to mine within the project area. Thus, Mr. Davis' NOI cannot lawfully be considered incomplete.

A. The Dispute between Mr. Davis and Red Slab, LLC Concerns the Relative Extent of Mr. Davis' Ownership of the Subject Property, not the Fact of Such Ownership.

The identified dispute with Red Slab does not concern whether or not Mr. Davis owns any interest in the subject property, it only concerns the extent of such ownership. It is undisputed that, at a minimum, Mr. Davis owns an undivided one-half fee interest in the property's surface and minerals. Mr. Davis' position, and the subject of the referenced dispute, is that he owns a 100 percent undivided fee interest in the property. Even assuming, without admitting, that Mr. Davis only owns the undivided one-half interest that is not subject to dispute, this undivided ownership entitles him to conduct mining operations on the property notwithstanding the lack of consent by other undivided interest owners therein.

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As an undisputed owner of an undivided fractional interest in the Mine, Mr. Davis has the legal right to mine. When a mineral estate is divided among more than one owner without reservation, each such owner may enter upon the property to explore and develop that mineral estate, so long as he does not exclude the other.³ Mr. Davis may freely develop the Mine so long as he does not exclude other cotenants from doing the same and renders an accounting to those cotenants on the basis of the value of the minerals extracted, less any reasonable costs of production and marketing.⁴ Of course, as mentioned above, there is a dispute relative to the extent, if any, of Red Slab's ownership of the subject property, so the required accounting of Mr. Davis' mining activities is subject to dispute as well. However, such disputes are not the concern of the Division. As the Division correctly noted in the Letter, "... the Division does not adjudicate land or mineral ownership disputes." The Act and the regulations merely require that Mr. Davis have the legal right to mine within the project area. Mr. Davis has this legal right. Requiring settlement of the disputes concerning the extent of Mr. Davis' ownership of the Mine as a condition of considering the NOI complete is not authorized by statute or regulation and is beyond the scope of the Division's authority.

B. The Conservation Easement Granted By Red Slab to Provo City
Does Not Affect Mr. Davis' Legal Right to Mine.

The conservation easement conveyed by Red Slab to Provo City that purportedly encumbers the Mine property has no material impact on Mr. Davis' rights to mine. This easement was not conveyed by Mr. Davis and it does not in any way encumber his interests in the Mine property.⁵ In other words, as to Mr. Davis, Provo City's conservation easement is a nullity. Because the conservation easement does not impact Mr. Davis' ownership interest, it does not affect his legal right to mine on the Mine property. The existence of this conservation easement cannot be used as an excuse to deem Mr. Davis' NOI incomplete.

³ See *Flying Diamond v. Rust*, 551 P.2d 509, 511 (Utah 1976) (Noting that cotenants are each entitled to full use, occupancy, and enjoyment of the entire property held in concurrent ownership); see also, *Mitchell Energy Corp v. Samson Resources Co.*, 80 F.3d 976 (5th Cir. 1996) ("... any cotenant has the right to extract minerals from the common property without the consent or participation of the other cotenants. This right is subject only to a duty to account for the other cotenants' proportionate part of the value of the [minerals] produced, less their proportionate share of... expenses.").

⁴ See *Utah Oil Refining Co. v. Leigh*, 96 P.2d 1100, 1102-03 (Utah 1939) (Plaintiff and Defendant, cotenants, each had "the right to free and unobstructed possession and enjoyment of certain commercial property, subject only to the obligation to render an accounting if one in sole possession depletes the land's resources or receives rent or income from the property).

⁵ See *Williams v. Singleton*, 723 P.2d 421 (Utah 1986) (One cotenant cannot bind any other cotenant by unilaterally making a contract relating to the concurrently held property).

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C. The Court Order Is Not Binding on Mr. Davis and Cannot Be Used to Deem the NOI Incomplete.

The Order referred to in the Letter originally stated: "The Court... ORDERS that Defendant [Michael McPhilomy] CEASE excavation activities at the project site and environs (commonly known as "Rock Canyon") until such time that this Court authorizes that such activities can occur."⁶ Subsequent references to this order by the Court appear to expand its reach to the subject property itself rather than just to the Defendant in the case, Michael McPhilomy. However, the referenced Order applies only to the Mr. McPhilomy as originally stated above, not to Mr. Davis or the subject property. Any other interpretation would yield nonsensical results. First, Mr. Davis was not a party to the proceedings in which the Order was given and restricting his property rights on the basis of that Order would amount to a serious due process violation. Second, the court neither asserted, nor could have had, in rem jurisdiction over the subject property and thus lacked the authority to bind the property in the manner suggested by the Division's interpretation of that Order.

Even assuming the Order is valid and binding on Mr. Davis, its existence cannot be used by the Division to consider the NOI incomplete. As mentioned, Mr. Davis will comply with the requirements of all applicable statute, rules, regulations and ordinances per the requirements of R647-1-102(3). He will also comply with any applicable orders of courts with proper jurisdiction.⁷ So, even assuming the Order is binding on Mr. Davis, Division acceptance of the NOI will not relieve Mr. Davis of the obligation to comply with the Order, but as discussed in Section III above, considering the NOI complete in the first place cannot be conditioned upon such compliance. Resolution of the referenced Order is a matter to be dealt with between Mr. Davis and the Court. There is nothing in the statutes or regulations that allow the Division to refuse acceptance of a complete NOI because of the existence of a court order. The referenced Order does not render Mr. Davis' NOI incomplete.

⁶ Order on Order to Show Cause, Case No. 031404142, Fourth District Court, Municipal Division, State of Utah, Utah County, Provo Department (December 26, 2003).

⁷ For the Division's information, at the April 13, 2006 hearing referenced above, the Court denied Provo City's motion for a preliminary injunction seeking to prevent commencement of mining operations on the Mine property.

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Finally, the Letter references the requirement that Mr. Davis post a reclamation surety for all mining and exploration operations. As discussed in the NOI itself, "the reclamation contract and surety will be provided to the Division for approval prior to start of operations."⁸

CONCLUSION

The Division has articulated no legally justifiable reason for its refusal to accept Mr. Davis' NOI as complete. The Division cannot fabricate requirements for "additional information" that are not called for by statute or regulation in a backhanded attempt to assert approval authority over NOI's for small mining operations where such approval authority is expressly denied by the Act and the Division's own regulations.

Pursuant to the requirements of UAC § R647-3-101(2), please confirm in writing within 10 working days of receipt of this letter that the NOI is complete subject to the Division's approval of the reclamation surety to be provided by Mr. Davis prior to commencing mining operations. If there are further questions or comments, I can be reached at the address above.

Very truly yours,

PRINCE, YEATES & GELDZAHLER



Christopher A. Jones

CAJ/dr

cc: Richard Davis
Camille Williams, Provo City

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⁸ NOI, p.9.